Sawyer of Napa, Inc. *and* Pacific Northwest District Council of International Ladies' Garment Workers Union, AFL–CIO. Cases 20–CA–23669 and 20–CA–23739

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On July 7, 1994, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party and the General Counsel filed exceptions, supporting briefs, and answering briefs. The Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

AMENDED CONCLUSIONS OF LAW

Add the following as Conclusion of Law 4 and renumber subsequent paragraphs.

''4. By refusing to bargain with the Union with respect to the effects on its tannery employees of its decision to close its Napa tannery, the Respondent has violated Section 8(a)(5) and (1) of the Act.''

AMENDED REMEDY

We agree with the judge that the Respondent's untimely withdrawal of recognition precluded meaningful effects bargaining prior to the closure of the tannery. We also agree with his recommendation that the *Transmarine*[2] remedy should be imposed, and that it should be imposed prospectively from the date of the Board's Order. The judge, however, finds that the Respondent did bargain to impasse over the effects of the tannery closure while the settlement agreement was in effect. The judge finds that as a result of this bargaining the Respondent has already complied with that portion of the *Transmarine* remedy requiring it to bargain with the Union and that there is no reason to order the Respondent to bargain again over the effects of the tannery closure. Accordingly, the judge limits the remedy to a requirement that the Respondent pay additional backpay to those laid-off or terminated employees who received less than 2 weeks' backpay. We do not agree with his conclusion that the remedy should be so limited.

As the judge notes in his decision, on withdrawal of a settlement agreement because of alleged noncompliance, the parties revert to the same position as if there had been no settlement agreement and a complaint is issued on the underlying unfair labor practices. If a violation is found, the respondent is subject in the first instance to the customary remedies imposed by the Board. In the instant matter, that means imposition of the full *Transmarine* remedy.

In any event, the bargaining which occurred pursuant to the settlement agreement did not comply with the requirements of *Transmarine*. The *Transmarine* remedy includes a backpay requirement designed not only to make employees whole for losses suffered as a result of the violation, but also to create in some practicable manner a situation in which the parties' bargaining is not entirely devoid of consequences for the respondent. It provides that if there are delays in the bargaining process, backpay increases until one of the stated conditions is met, thereby insuring that the consequences to the respondent are progressively greater and that there is a corresponding enhancement of the union's bargaining strength.

The Respondent, throughout the bargaining, incorrectly took the position that the *Transmarine* remedy is limited to 2 weeks' backpay. It took this view despite the Union's repeated counseling that the Respondent's backpay liability was continuing to increase. While the Respondent, after the settlement agreement, did bargain concerning the effects of the shutdown, it refused to acknowledge or accept its full responsibilities under the *Transmarine* remedy. Accordingly, the Respondent did not suffer the full consequence of the *Transmarine* remedy and the Union was not accorded the full bargaining strength that the *Transmarine* backpay provisions were designed to generate.

We are not, as asserted by our dissenting colleague, finding that the Respondent was required to adopt any particular position during effects bargaining. The Respondent was free to take any position it wished with respect to such bargaining. However, having voluntarily entered into a settlement agreement requiring that the bargaining was to be conducted under the terms of the *Transmarine* remedy, the Respondent was not free to modify those terms by erroneously claiming

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by telling the employees that they may not receive severance pay because the Union filed charges against the Respondent.

We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[2] *Transmarine Corp*., 170 NLRB 389 (1968).

that the *Transmarine* remedy was limited to 2 weeks' backpay. When it did so, it failed to honor the settlement agreement and deprived the Union of the full bargaining strength it was entitled to under its provisions. In these circumstances there was no legally cognizable impasse.

Therefore, we find that the bargaining required by *Transmarine* has not occurred under the required conditions and that the full *Transmarine* remedy is required.[3] Accordingly, we shall order the Respondent to bargain with the Union, on request, about the effects on its tannery employees of the Napa, California tannery shutdown, and to pay these employees amounts at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on the employees at its Napa tannery; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount the employee would have earned as wages, from the dates on which the Respondent terminated its Napa tannery (November 30 and December 7 and 14, 1990), to the time he secured equivalent employment elsewhere or the date when the Respondent offered to bargain, whichever occurred sooner; provided however, that in no event shall this sum, including severance pay, be less than these employees would have earned for a 2-week period at the rate of their normal wages, when last in the Respondent's employ, with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] The Respondent asserts that the Union did not comply with its obligation to bargain in good faith. There is insufficient evidence to support that assertion. Further, as the wrongdoer, the Respondent must first meet its obligations under *Transmarine* before it can claim that the Union has failed to bargain in good faith. Because the Respondent has continuously refused to acknowledge the full backpay requirement, it has, as set forth above, failed to fully satisfy its obligation to bargain. Therefore, it has no standing to assert that the Union has failed to bargain in good faith.

We find no merit in the General Counsel's and the Charging Party's exceptions to the judge's deduction of severance pay from the backpay owed as a result of the Respondent's 8(a)(5) violation. *W. R. Grace & Co.*, 247 NLRB 698, 699 fn. 5 (1980).

Contrary to her colleagues, Member Browning would not allow the severance pay received by the employees to be deducted from the backpay owed as a result of the *Transmarine* remedy. For the reasons set forth in her further concurrence in *Dallas Times Herald*, 315 NLRB 700, 703–705 (1994), Member Browning would overrule *W. R. Grace*, 247 NLRB 698, 699 fn. 5 (1980), to the extent that it holds that such a deduction is proper.

ORDER

The National Labor Relations Board orders that the Respondent, Sawyer of Napa, Inc., Napa, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Union at a time when there are pending unremedied unfair labor practices.

(b) Refusing to bargain with Pacific Northwest District Council of International Ladies' Garment Workers Union, AFL–CIO, with respect to the effects on its tannery employees of its decision to close its Napa tannery.

(c) Telling employees that they may not receive severance pay because of charges filed by the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the employees of the former Napa tannery their normal wages for the times set forth in this Decision.

(b) On request, bargain collectively with Pacific Northwest District Council of International Ladies' Garment Workers Union, AFL–CIO, with respect to the effects on its tannery employees of its decision to close its Napa tannery, and reduce to writing any agreement reached as a result of such bargaining.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail to its former tannery employees copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be mailed by the Respondent within 14 days after receipt thereof.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER COHEN, dissenting in part.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

I agree with the judge with respect to his well-considered resolution of the *Transmarine Corp.*, 170 NLRB 389 (1968), issue. My colleagues have reversed his decision in this regard. I therefore dissent.

Under *Transmarine*, backpay begins to run 5 days after the entry of the Board Order. The backpay can terminate at various points, including the reaching of an impasse in the ''effects'' bargaining. The minimum award is a 2-week backpay.

In the instant case, the Respondent refused to bargain in October 1990 concerning the effects of the decision to close the tanning facility. That refusal was unlawful. However, the Respondent thereafter did bargain on that subject, beginning in May 1991. The General Counsel and the Union concede that such bargaining reached an impasse. Further, it is clear that the impasse was a legally cognizable one. There is no complaint allegation that the bargaining was in bad faith. Nor does the evidence establish such bad faith. My colleagues suggest that the Respondent ''incorrectly'' took the position, in bargaining, that severance pay should be limited to 2 weeks. However, there is no ''correct'' or ''incorrect'' position in bargaining under the Act. The Board cannot dictate to a party the ''correct'' position to be taken in bargaining.[1] Indeed, the Board cannot do so even as a remedy for an antecedent refusal to bargain.[2] In short, my colleagues have confused remedial issues with bargaining issues. As a remedy for a refusal to bargain on ''effects,'' the Board imposes a minimum award of 2 weeks' backpay. However, as noted above, in the bargaining itself, a party is free to take whatever position it wants.

My colleagues assert that the Respondent failed to adhere to an informal settlement agreement that it signed in May 1991. However, assuming arguendo that this is so, it is not contended, nor could it be, that breach of an informal settlement agreement is itself an unfair labor practice. In addition, as discussed supra, the settlement agreement did not require the Respondent to take any particular position in bargaining. More particularly, the Respondent was not required to offer 2 weeks' pay (or any other amount) as a proposal in bargaining. For example, under the Act, an employer could offer 1 week of pay. If there is no impasse as of the time of a Board *Transmarine* decision, a backpay remedy would begin to run, and a minimum of 2 weeks' pay would be awarded. However, in the instant case, the Respondent bargained to impasse prior to the Board's Order.

In sum, the Respondent has already bargaining to a legally cognizable impasse. There is therefore no need to require the Respondent to bargain further in this respect. In addition, in view of the prior bargaining to impasse, the backpay (which begins after the entry of a Board Order) has essentially been tolled before it begins. Thus, backpay is zero and, under *Transmarine*, the 2-week minimum is applicable. Finally, since severance pay is a setoff from *Transmarine* monetary remedies,[3] the remedy in this case is backpay only for those employees who received less than 2 weeks' severance pay.

The aforementioned analysis was applied by the judge. He was correct, and I would affirm his decision.

[1] See Sec. 8(d) of the Act.

[2] *H. K. Porter*, 397 U.S. 99 (1970).

[3] *W. R. Grace*, 247 NLRB 698.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from the Union at a time when we have failed to comply with a Decision of the National Labor Relations Board which requires that we remedy past violations of the National Labor Relations Act.

WE WILL NOT refuse to bargain with the Union with respect to the effects on our tannery employees of our decision to close our Napa tannery.

WE WILL NOT tell employees that they may not receive severance pay upon the closure of the tannery because the Union has filed charges with the National Labor Relations Board.

WE WILL NOT in any or like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with Pacific Northwest District Council of International Ladies' Garment Workers Union, AFL–CIO, with respect to the effects of our decision to close our Napa Tannery on the employees who were employed there and to reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the employees who were employed at the Napa tannery their normal wages for a period required by a Decision and Order of the National Labor Relations Board.

SAWYER OF NAPA, INC.

Leticia Pena, Esq., for the General Counsel.
Nancy E. Watson, Esq. (Teal, Montgomery, Bozman & Ross), of Santa Rosa, California, for the Respondent.
Sanford N. Nathan, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Napa, California, on January 24, 25, and 26, 1994. The charge in Case 20–CA–23669 was filed on October 19, 1990, by Pacific Northwest District Council of the International Ladies' Garment Workers Union, AFL–CIO (the Union). The charge in Case 20–CA–23739 was filed by the Union on November 28, 1990. On December 29, 1992, the Acting Regional Director for Region 20 of the National Labor Relations Board (the Board) issued an order withdrawing approval of settlement agreement; order consolidating cases and consolidated complaint and notice of hearing. The complaint alleges violations by Sawyer of Napa, Inc. (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Union. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation with an office and place of business located in Napa, California, where, at times material here, it was engaged in the tanning, processing, manufacturing, and nonretail sale of sheepskins and related apparel. In the course and conduct of its business operations, the Respondent annually sold and shipped from its Napa, California facility goods valued in excess of $50,000 directly to points outside the State of California. It is admitted, and I find, that at all times material here the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue in this proceeding is whether the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union prior to the time it had complied with the remedial provisions of a Board decision and thereupon precluded the Union from bargaining about the effects of the Respondent's closure of its tannery operations; and, if so, what the appropriate remedy under the circumstances should be.

B. *The Facts*

On July 28, 1989, the Union was certified as the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and regular part-time production and maintenance employees including drivers, tannery employees, coat factory employees, lead persons, shipping and receiving employees, and quality control employees employed by Respondent at its 68 Coombs Street, Napa, California, facility; excluding clerical employees, assistant foremen, guards and supervisors as defined in the Act.

On September 28, 1990, the Board issued its decision in *Sawyer of Napa*, 300 NLRB 131 (1990), finding that in November 1988, during the Union's organizational campaign, the Respondent unlawfully discharged two employees because of their union activity.[1]

Collective-bargaining negotiations apparently commenced shortly after the Union was certified in July 1989, and continued until October 9, 1990, a period of some 16 months. The parties were unsuccessful in negotiating a collective-bargaining agreement. On about October 9, 1990, just 12 days after the issuance of the aforementioned Board decision, the Respondent received a petition from a majority of its employees advising that they no longer wished to be represented by the Union; thereupon the Respondent withdrew recognition from the Union. This occurred at a time when the Respondent had failed to comply with the remedial provisions of the decision, which required an offer of reinstatement and the payment of backpay to the employees who had been unlawfully discharged.

Katie Quan is the manager of the Union and had been engaged in contract negotiations with the Respondent from the outset of bargaining. Quan testified that she received a phone call from Milton Dranow, the Respondent's CEO, in June 1990. Dranow advised Quan that he might close the tannery, and that the Union would be getting notification by the end of the week. On June 6, 1990, the Union engaged in an economic strike against the Company.[2] It lasted for only 2–1/2 days, until June 8, 1990. Also on June 6, 1990, the Respondent sent Quan a lengthy letter signed by Billy R. Potter, president of the Respondent's tannery operations, as follows:

> As you and I have discussed on several occasions, both at and away from the bargaining table in the past few months, there exists a worldwide slowdown in the demand for shearling skins such as those which are produced here at the Napa facility. Specifically, we have provided you with documentation showing you the slowdown in incoming orders.
>
> As we have also discussed, it was our hope that this slowdown would be seasonal in nature. However, now

[1] In addition, the Board found that in October 1988 the Respondent unlawfully discharged one employee because of his protected concerted activity in refusing to work overtime; this was the subject of a separate charge filed by the individual employee, and apparently was unrelated to the union activity.

[2] It appears that the strike was in protest of the lack of progress in bargaining, and was unrelated to the phone call from Dranow in which he advised the Union of the closure of the tannery.

> that we are into what is usually our busiest time of the year and the slowdown in orders has continued, we must now begin to face the probability that this will be a prolonged downturn. Moreover, as I have also discussed with you and [business representative] David Bacon repeatedly at our negotiations, the high degree of regulatory control exercised by the various administrative agencies having jurisdiction over tannery operations has directly resulted in the closure of almost all tanneries in this state. In fact, I have given you the names of several of these tanneries and discussed with you the specifics which underlay their closures. Indeed, to our knowledge, Sawyer is the only plant in California which is still permitted to chrome tan raw skins. However, in this regard, we recently spent $150,000 to buy equipment and otherwise upgrade our wastewater treatment in order to attempt to meet new regulations and, as far as we know, this is just the tip of the iceberg regarding future expenditures on this and other environmental concerns, too numerous to list here.
>
> Also, as you are aware, the local media have recently widely publicized their opinion that our use of perchlorethylene in the tanning process results in a potential cancer hazard to the Napa community at large. As might be imagined, although our use of this process is perfectly lawful, the widespread publicity has irretrievably injured our image and reputation in this community and exposed us to a greatly increased likelihood of costly litigation filed by residents who believe, however inaccurately, that their health problems or worse have been proximately cause by our operations.
>
> For each and all of these reasons, we wish to notify you that Sawyer's Board of Directors is seriously contemplating the closure of the Napa tanning facility. Because we value your opinion and want your input regarding this contemplated decision, we would like to schedule a meeting to discuss this matter with you as soon as possible . . . please be advised that the Board of Directors intends to make a decision regarding this matter sometime during the week of June 11, 1990, thus we must receive the Union's input on this issue by no later than the close of business, Friday, June 8, 1990, in order to present it to the Board in a timely manner.

The parties met on June 7, 1990, to discuss what was set forth in the letter. They met again on June 8, 1990; this was a scheduled negotiating meeting, and contract items were also discussed. They met again on June 13, 1990. During each of the meetings, the parties discussed and bargained over the decision to close the tannery, and at each meeting the Respondent asked the Union to consider an agreement to indemnify the company for environmental lawsuits in the event it remained open. The Union refused to do this, and proposed that if a contract were agreed upon, the Union would attempt to assist the Company with lobbying efforts to effect environmental legislation, and, in this regard, would offer the Company the use of the Union's health and safety consultants. The Company said that a decision on closing the tannery would be made later that week.

Another negotiating session was held on June 25, 1990. Contract items were discussed.

On June 29, the Respondent sent a letter to the tannery employees advising them that pursuant to the Worker Adjustment and Retraining Notification Act (WARN Act) they were being advised of plans to initiate a plant closing and mass layoff that was expected to be permanent. The letter states:

> Pursuant to the Worker Adjustment and Retraining Notification Act, this is to inform you that Sawyer of Napa, Inc . . . plans to initiate a plant closing and mass layoff. This planned action is expected to be permanent.
>
> This action is due to a lack of sufficient orders from our customers for tannery skins coupled with restrictive and pressing Federal, State and Local environmental regulations both current and proposed. After careful deliberation, the Board of Directors have decided that the continuation of tannery production is unfeasible in our Napa, California location. We regret that business conditions make this decision necessary.
>
> Sawyer anticipates that a mass layoff of most tannery employees will occur within a 14 day period commencing September 14, 1990. It is expected that you will be separated September 14, 1990. Bumping rights do exist.[3]

A similar letter was sent at the same time to the Union, with the heading ''Notification under the Worker Adjustment and Retraining Notification Act.'' This letter contained the names and job titles of some 129 tannery employees who would be dismissed. Further, it advised that the Footwear/Accessories and Garment Divisions of the Respondent's operations would not be affected; apparently, the Respondent employed about 30 unit employees in these divisions.

Another negotiating meeting was held on July 3, 1990. The Union asked a number of questions about the decision to close, and inquired whether the decision was final and whether there were any alternatives. Potter said that he didn't see any alternatives to closing the tannery unless the environmental laws could be changed. Bumping rights into the coat factory were discussed. Quan asked whether the company intended to pay severance pay, and Bill Potter said that they intended to negotiate about severance pay. There was some discussion about severance pay and the continuation of medical coverage for the employees following the closure. Tannery President Potter stated that it looked like the coat factory would remain open as there were current orders. He also stated that if the Respondent could get sufficient tannery orders there might be enough business to justify an extension of the closure date, and that the closure date of September 14, 1990, was not set in concrete and might be extended. However, according to Potter, the tannery would definitely not be operating in 1991.

On July 5, 1990, the Respondent sent a WARN letter to the Union regarding the 11 coat factory and accessory department employees who might get bumped by the tannery employees ''in keeping with the seniority provisions of the contract of which we have tentatively agreed upon in regards to bumping rights.''

[3] As a result of contract negotiations, the parties had tentatively agreed to certain bumping rights between the tannery employees and the employees in Respondent's other operations or divisions, all of whom are included in the same unit.

As noted above, there had been many bargaining sessions over the Respondent's decision to close the tannery operations, and, as the Respondent was a large and long-established employer within the Napa community, there was much media attention. The Respondent maintained, both to the media and the Union, that the decision to close the tannery was due to economic and environmental concerns, while the Union remained unconvinced and expressed its views to the media and, during ongoing negotiations, to the Respondent, that the decision to close the tannery was union related.

It appeared to the Respondent that the Union was acting in a fashion detrimental to the interests of the employees by advising them that the announced tannery closure was a bargaining ploy and that they need not be unduly concerned about it. On July 13, 1990, the Respondent issued another letter to its employees in an attempt to answer their concerns. The letter states that the Respondent's decision ''should not be misunderstood; it is final and not a negotiating ploy. We will continue to negotiate with the Union on other issues in good faith. . . . It is in your best interest to recognize this decision as final so that you may be protected by making the adjustment necessary for your future livelihood.''

Additional meetings were held on July 18, August 1, and August 8, 1990. At each of these meetings, the Respondent answered the Union's questions about the closing, and contract negotiations were conducted. While the Respondent was willing to discuss any matters regarding the effects of the closure upon the employees, it did not take the initiative in this regard, and the Union did not elect to engage in effects bargaining during this period.

On August 28, 1990, during a negotiating meeting, the Respondent advised the Union that it was extending the date for the closing of the tannery because only 10 or 12 employees had found other jobs. Also, the Union was provided a letter from the Bay Area Quality Management District, dated August 21, 1990, stating that in the event the Respondent's dry-cleaning operations were not eliminated prior to January 1, 1991, the Respondent would be liable for a penalty of up to $25,000 per day. The parties discussed the manner in which the tannery production operations would be phased out. Also, they continued contract negotiations and came close to a tentative agreement on a health and welfare contract provision.

On September 7, 1990, the Respondent issued a second or revised WARN notice stating that its employees ''would be separated from the company within a 14 day period commencing November 30, 1990 . . . as we have fortunately been able to continue operations past this original [September 14, 1990] time and we wanted to inform you as soon as possible.''

The next negotiating meeting had been previously scheduled for September 25, 1990, but was canceled due to the unavailability of Tannery President Potter. By letter dated September 27, 1990, the Union requested that the Respondent bargain about its ''purported decision'' to close the tannery. The letter further states:

> Included in this request to bargain is a commitment that the company also commence bargaining immediately over the effects of this decision to close. For example, we expect the company to bargain over all issues pertaining to the effects of a closure, including but not limited to, severance, medical coverage, transfer rights, etc.

The Respondent replied by letter dated October 5, 1990, stating that the decision to close was final and had previously been bargained about, and that no further bargaining on that point would be productive; further, the Respondent advised that it was treating the Union's letter as a request to bargain over the effects of the decision to close the tannery.

Another bargaining session had previously been scheduled for October 10, 1990; however, because the Respondent withdrew recognition on October 9, 1990, the Respondent canceled this meeting. By telegram dated October 10, 1990, the Union protested the withdrawal of recognition and the cancellation of the bargaining meeting, stating that the Respondent was obligated to bargain ''over the impending tannery closure and its effects, severance pay, extension of medical benefits for affected workers and an agreement covering any remaining workers in the coat factory, accessories department or any other workers covered by certification 20–RC–16332.'' In addition, the Union included a demand for immediate reinstatement and the payment of backpay to those employees unlawfully discharged as found by the Board in its then recent September 28, 1990 decision, which had issued only 2 weeks earlier.

The Respondent refused to rescind its withdrawal of recognition of the Union, and the Union filed the instant charge on October 19, 1990, alleging that the Respondent had unlawfully withdrawn recognition and was refusing to bargain as required by the Act.

On November 30, 1990, 25 tannery employees were terminated; and between December 7 and 15, 1990, some 43 additional tannery employees were terminated, at which point tannery production operations ceased.[4] As of December 15, 1990, only about 15 unit employees were actually at work, some of them being tannery employees who were retained, apparently, for maintenance rather than production purposes; also, 27 employees were on layoff status.

On the date of their terminations, the employees were given severance pay, calculated by the Respondent as follows: Those employees with 1 year or less of service received 1 weeks' pay; those employees with 2 years of service received 2 week's pay; those employees with between 3 and 5 years of service received 3 week's pay plus $100 per year thereafter; those employees with over 5 years of service received 5 week's pay plus $100 per year thereafter. The minimum amount any employee received was $247 and the maximum was $3096.

As stated above, the last bargaining session had been held on August 28, 1990. Some 9 months later, in May 1991, the Respondent complied with the remedial provisions of the Board decision, and also entered into a settlement agreement in the instant matter. The settlement agreement provided for recognition of and bargaining with the Union. It contained a nonadmission clause, and provided for the posting of a notice. In addition, it appears that the notice was mailed to each of the Respondent's former tannery employees. Also, it included the following language under the paragraph in the settlement form entitled ''BACKPAY'':

[4] Apparently, this included tannery employees who were on layoff at the time.

> The Charged Party will make whole the employees named below by payment to each of them the amount opposite each name.
>
> Severance pay for laid off tannery employees to be computed in accordance with the formula set forth in the Board's decision in *Transmarine Corp*., 170 NLRB 389 (1968), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The notice language states, inter alia, that:

> WE WILL, upon request, recognize and bargain collectively with the Union concerning the effects of the closure of the tannery and with respect to the wages, hours and other terms and conditions of employment of our remaining employees in the following appropriate collective bargaining unit:
>
> [Unit language omitted]
>
> WE WILL pay our employees who have been laid off from the tannery in accordance with the formula set forth in the Board's decision in *Transmarine Corp*., 170 NLRB 389 (1968), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On May 20, 1991, the Union sent the following telegram to the Respondent:

> Pursuant to NLRB Settlement, Cases 20–CA–23699 and 20–CA–23739, we request recognition and resumption of bargaining over effects of tannery closure and wages and working conditions for remaining employees of Sawyer of Napa.

Andy Kilass, labor relations consultant, who had represented the Respondent during the first set of negotiations until August 28, 1990, was rehired by the Respondent to continue negotiations with the Union. Kilass had not negotiated the settlement agreement, and had maintained no relationship with the parties during the hiatus. He was told by Tannery President Potter that he was to negotiate with the Union regarding the effects of the tannery closure upon the employees, and, in addition, that he was to continue negotiating a collective-bargaining agreement with the Union covering the coat factory and accessory employees. Regarding the ''effects'' bargaining, Kilass was told by Potter that as a result of the settlement agreement the Respondent was obligated to pay 2 week's severance pay to those employees who had only received 1 week's severance pay and, further, that the Respondent would be required to pay any additional amounts of severance pay that could be mutually agreed upon with the Union as a result of bargaining. Kilass was not conversant with the Board's *Transmarine* decision, and he did not regard reaching an impasse in effects bargaining as a priority.

The first postsettlement negotiating session was held on June 4, 1991. At this session, according to the credited testimony of Kilass, bargaining over the effects of the tannery closure commenced. Although no specific proposals were made by either party, the Respondent answered the Union's questions regarding severance pay and related matters for the tannery employees. However, most of the bargaining related not to effects bargaining on behalf of the tannery employees, but rather to the continuation of contract negotiations for the coat factory employees. Additional bargaining sessions were held on June 28, August 16, September 20, October 3 and 11, and November 6 and 26, 1991. At each of these meetings parties bargained about the effects of the tannery closure upon the employees, as well as for a collective-bargaining agreement covering the remaining employees. At the September 20 meeting, the Union was advised that the coat factory, which then apparently employed about 35 employees, would be closed sometime in December 1991, and that the Respondent was sending WARN letters to the coat factory employees. Thereafter, effects bargaining was conducted on behalf of both the tannery employees and the coat factory employees.

While the Respondent willingly discussed any matters brought up by the Union pertaining to effects bargaining over the tannery closure, the Respondent apparently did not attach any immediacy to such bargaining. Neither did the Union. Thus, the Union's position, as stated to the Respondent with some frequency, was that the backpay clock under *Transmarine* was continuing to run, and the longer the parties bargained the more the Respondent's backpay liability would be. At the October 3, 1991 meeting, Kilass asked the Union what incentive it had to bargain in good faith over the effects of the tannery closure in view of the Union's belief that backpay continued to run. He accused the Union of not wanting to reach an agreement and of engaging in bad-faith bargaining as it had not to that date made a specific proposal on severance pay. One of the union representatives stated that it wasn't the Union's problem if the parties couldn't reach agreement, as the Respondent's liability for backpay was still running. However, after a caucus, the Union came back to the table and made its first proposal regarding severance for the tannery employees: this was a ''package'' proposal and required agreement upon the contract for the coat factory employees. Kilass rejected the Union's severance pay proposal, and continued to insist that the Respondent's severance proposal was that it was willing to pay another week's severance pay to those employees who had received less than that.

Thereafter, the Union made various proposals, demanding more money for severance pay. Kilass rejected the Union's proposals, and remained adamant that the only amount the Respondent would pay was 1 additional week's pay for those tannery employees who had not received a minimum of 2 week's pay, and that only in ''hardship'' cases would the Respondent possibly be willing to pay severance pay to those employees who had quit prior to the closure of the tannery. The parties understood the term ''hardship'' to refer to employees who, in anticipation of the tannery closure, had quit and had obtained temporary employment with another employer in the hope of a permanent job, but were laid off by that employer shortly thereafter; if the Union was aware of any such cases, it was advised that it could bring them to the attention of the Respondent.[5] In addition, Kilass said that

[5] The Union did not bring any such cases to the attention of the Respondent. Further, it should be noted that prior to August 28, 1990, there was some limited effects bargaining over the tannery

the severance pay for the coat factory employees would be consistent with the amount the tannery employees had received. Kilass disputed the Union's contention that the backpay ''clock was still running,'' and advised the Union that his communications with a Board agent in the Regional Office caused him to believe what he had stated all along, that *Transmarine* only required the additional payment of 1 week's severance pay for tannery employees who had received less than that amount.

According to Kilass, the parties agreed that an impasse in effects bargaining was reached at the November 6, 1991 meeting, as at that point all of the various proposals of the Union had been rejected and the Respondent had not deviated from its initial proposal regarding severance pay.

The coat factory ceased operations, and there was no further bargaining. On July 31, 1991, the Union sought to reinstitute the charges underlying the settlement agreement. While the Regional Office did not conclude that the Respondent had failed to comply with those terms of the settlement agreement requiring the Respondent to bargain in good faith about the effects of the tannery closure upon the employees and about a collective-bargaining agreement for the coat factory employees, the Region did ultimately conclude, apparently on about October 26, 1992, that the *Transmarine* remedy in the settlement agreement was not satisfied by the Respondent's mere offer to pay an additional week of severance pay to those employees who had received less than that. Thereupon, on December 10, 1992, Kilass wrote the following letter to the Region:

> After a lengthy review and discussion with Mr. Dranow at Sawyer, we have concluded that we must disagree with the Region's position. It is clear to the Employer that the application of the Region's interpretation of *Transmarine* under the circumstances of this case goes far beyond remedial, and is clearly punitive.
>
> Under these circumstances, we must request that the settlement agreement in this matter be set aside and the complaint be reissued.

As noted above, the then Acting Regional Director withdrew approval of the settlement agreement and issued the instant complaint on December 29, 1992. Included in the complaint are several instances of 8(a)(1) conduct which had also been remedied by language in the settlement agreement. Thus, the notice posted by the Respondent and mailed to the employees contained the following language:

> WE WILL NOT tell our employees that we cannot make a decision about severance pay, or that we cannot pay severance, because the Union has filed charges with the National Labor Relations Board.

The record evidence regarding these allegations of the complaint is set forth below.

Subsequent to the Respondent's withdrawal of recognition on October 9, 1990, the Respondent advised the employees to speak with Personnel Manager Sandra Hood in the event they wanted to discuss any matters regarding the closure of the tannery.

Employee Roberto Espinosa Pena testified that he had three different discussions with Personnel Manager Hood in her office in November 1990. Hood spoke in English, and a secretary translated the portion of Hood's comments that Pena was unable to understand. On one occasion Pena asked Hood if the employees were going to receive severance pay, and Hood replied that she didn't know whether the employees would receive any severance pay since the Company ''was spending too much money on attorneys, defending itself from the Union who was making too many charges.''

On the second occasion, Pena again asked her about severance pay, and she said that she was meeting with management, namely, Dranow and Potter, about the matter, and that she ''didn't know anything, that the Union had their hands tied.''

On the third occasion, Hood again said that she didn't know about severance pay because her meetings with management were continuing and ''they were still having many problems because the Union was putting too many charges against the company.''

In mid-November, 1990, at a safety meeting, in the presence of 10 or 12 employees, Pena asked Supervisor Rudy Hernandez whether the tannery employees would be receiving severance pay. Hernandez said, according to Pena, ''that he thought that we would not be receiving anything because the Union had their hands tied and he didn't know anyway.''

Former Personnel Manager Hood testified that although she did not recall any conversations with Pena about severance pay, she would not have made the statements he attributed to her as she was at that time involved with management in deciding upon the amount of severance pay the employees would be receiving; therefore she would not have stated to any employee that the Union had the Company's hands tied or that she didn't know if the employees would be receiving any severance pay.

Former Supervisor Hernandez denied that he made any such statement to any employees, and testified that in the event employees asked questions about such matters he would have referred them to Personnel Manager Hood.

C. *Analysis and Conclusions*

It is well established that an employer may not withdraw recognition from a union during the pendency of serious unremedied unfair labor practices.[6] Whether or not the prior unremedied unfair labor practices are sufficiently serious to preclude the withdrawal of recognition is a matter for determination in each instance. Here, the Board found that in November 1988, the Respondent unlawfully discharged two employees because of their activity on behalf of the Union. In October 1990, 2 years later, the Respondent withdrew recognition at a time when the two unlawfully discharged employees had not been offered reinstatement or paid backpay, and when the Respondent had not advised its employees, by the posting of an appropriate notice, that it would remedy such violations and would not engage in similar future violations; and indeed, the Board's decision in this matter had issued just 12 days earlier. Under such circumstances, I conclude that the Respondent was not privileged to withdraw

closure, and the Respondent had made the same proposal to the Union at that early date.

[6] *United Supermarkets*, 287 NLRB 119, 120 (1987); *Olson Bodies, Inc.*, 206 NLRB 779 (1973); *Pittsburgh Trucking Co.*, 249 NLRB 833 (1989); and *Taylor Hospital*, 279 NLRB 28 (1986).

recognition as the unremedied unfair labor practices were serious and continuing, and it may not be concluded that such prior unlawful conduct could have had no influence on the employees' desire to forgo union representation. The cases cited by the Respondent are readily distinguishable.[7] Accordingly, I conclude that by withdrawing recognition on October 9, 1990, the Respondent has violated Section 8(a)(5) of the Act as alleged.

The Respondent takes the position that even assuming arguendo that its withdrawal of recognition was untimely, it nevertheless did not preclude the Union from engaging in timely effects bargaining with regard to the closure of the tannery. Thus, the Respondent gave the Union every opportunity to bargain over the effects of the tannery closure, but the Union elected to bargain over other matters; it was not the Respondent's fault that the Union did not treat the impending closure with sufficient seriousness, but rather continued to disbelieve that the tannery closure was imminent.

The last presettlement negotiating session was held on August 28, 1990. On that date it was announced that the tannery closure would be extended from September 15, 1990, as originally announced, to November 30, 1990. Clearly the Union had time to engage in effects bargaining subsequent to August 28, 1990, but the cancellation of the September 25, 1990 bargaining session[8] and the Respondent's unlawful withdrawal of recognition on October 9, 1990, precluded such bargaining. Accordingly, I find without merit the Respondent's contention that the Union was given a sufficient opportunity to engage in effects bargaining prior to October 9, 1990, but did not avail itself of the opportunity to do so. The Union believed that it had an additional 3 months after August 28, 1990, when the November 30, 1990 closing date was announced, to engage in such bargaining. However, by its withdrawal of recognition the Respondent severely shortened the Union's opportunity in this regard by nearly 2 months.

On the withdrawal of a settlement agreement because of alleged noncompliance, the parties revert to the same positions as if there had been no settlement agreement, and a complaint is issued on the underlying unfair labor practices. Thereupon, in the event a violation of the Act is found, the respondent is subject, in the first instance, to the customary remedies imposed by the Board for the type of violation requiring remedial relief. In the instant matter, as it has been found that the Respondent's untimely withdrawal of recognition precluded meaningful effects bargaining prior to the closure of the tannery, it appears that a *Transmarine* remedy is appropriate because it is specifically designed to remedy such violations of the Act. I so find.[9]

Both the General Counsel and the Union take the position that it would be an exercise in futility to impose a new, prospective, *Transmarine* remedy which would require the parties to bargain to impasse and which would begin running from the date of the Board's decision in this matter, as the parties have already admittedly bargained to impasse over the effects of the tannery closure during the course of the postsettlement bargaining. Thus, the General Counsel and the Union take the position that the *Transmarine* remedy must be tailored to fit the instant situation by simply requiring the Respondent to pay a specified number of weeks of backpay; in other words, the settlement agreement, even though nullified by the issuance of the complaint, must be enforced as if it were a viable Board decision.

Further, notwithstanding that the customary *Transmarine* backpay remedy is prospective and begins 5 days after the issuance of a Board decision, the General Counsel and the Union maintain that the backpay period should be retroactive to December 15, 1990, the date of the closure of the tannery,[10] and should run until September 20, 1991 (the General Counsel's position), or until October 3, 1991 (the Union's position), when the Respondent came to the bargaining table with a severance pay proposal. Thus, the Respondent should be required to pay between 40 and 44 weeks of backpay to each tannery employee. In addition, the Union argues that backpay should also be paid to those employees who voluntarily left the Respondent's employ prior to the tannery closure after receiving the WARN notice, as these employees may have benefited from the Union's bargaining efforts.[11]

While an extraordinary remedy of the general type suggested by the General Counsel and the Union might be appropriate in an instance where a respondent enters into a settlement agreement for the purpose of circumventing the policies of the Act and to gain time in which to further violate the Act, that is not what occurred in the instant case. The Respondent kept the Union apprised of all matters regarding the closure and did, in fact bargain at length about the decision to close the tannery. Further, it was always willing to bargain about the effects of the tannery closure prior to the withdrawal of recognition, but the Union did not elect to do so, believing that such bargaining was premature. Nor did the Respondent engage in bad-faith bargaining during the postsettlement negotiations: While it took a different position on the interpretation of *Transmarine*, it was at all times willing to engage in good-faith bargaining regarding any severance pay the parties could agree upon in addition to the minimum of 2 week's backpay which it acknowledged was its obligation under *Transmarine*. Indeed, the Union made no proposals regarding severance pay until some 6 months after such bargaining commenced, and clearly had no incentive to bargain to impasse.

The General Counsel and the Union maintain that the backpay period should end on the date the Respondent made its first severance proposal and that this occurred in Septem-

[7] *Master Slack Corp*., 271 NLRB 79 (1984); *Johns-Manville Sales Corp*., 282 NLRB 182 (1986); *Purolator Products*, 289 NLRB 986, 992–993 (1989); *Airport Aviation Services*, 292 NLRB 823, 824 (1989); *Holiday Inn of Victorville*, 284 NLRB 916, 933 (1987); *Storer Communications*, 297 NLRB 296, 299 (1989).

[8] I do not find that the cancellation of this meeting was a conscious effort on the part of the Respondent to evade its bargaining obligation; rather, Potter was simply unavailable.

[9] See also *Santa Cruz Convalescent Hospital*, 300 NLRB 1040 (1990); *Interstate Tool Co*., 177 NLRB 686 (1969).

[10] In this regard, it appears that the General Counsel and the Union would treat the withdrawal of recognition as if the Respondent had deliberately concealed the tannery closure from the Union in order to preclude effects bargaining. See *Walter Pape, Inc*., 205 NLRB 719 (1973); *Avila Group*, 218 NLRB 633 (1975).

[11] As noted previously, there was some discussion between the parties prior to the withdrawal of recognition regarding severance pay for employees who quit work after the announcement of the tannery closure. The Respondent's position has always been that it might be amenable to paying severance pay in ''hardship'' cases, but not generally to all employees who quit prior to the closure.

ber or October 1991. I disagree. Clearly, on June 4, 1991, at the very outset of postsettlement bargaining, it was understood that the Respondent proposed to pay an additional week's backpay to those employees who received less than 2 week's backpay; this, in my opinion, constitutes the Respondent's initial severance pay proposal.

Under all the foregoing circumstances, there appears to be no reason to impose an extraordinary remedy upon this Respondent. Thus, I shall recommend that the customary *Transmarine* remedy be imposed, prospectively, from the date of the Board's decision in the instant proceeding. Further, as the Respondent, I find, has bargained to impasse in good faith over the effects of the tannery closure and over all other matters, there is no reason to require the parties to rebargain the effects of the tannery closure on the employees. Accordingly, I conclude that the appropriate remedy in this case is as set forth in the remedy section of this decision, infra.

In addition to finding that the Respondent has violated Section 8(a)(5) of the Act by withdrawing recognition during the pendency of unremedied unfair labor practices, I also find that it has violated Section 8(a)(1) of the Act by the remarks of Personnel Manager Hood and Supervisor Hernandez to employee Roberto Pena and other employees. Thus, I credit Pena and find that he and other employees were told, in effect, that the employees may not be receiving severance pay because the Union had tied the Company's hands in this regard by filing charges and thereby causing the Respondent to incur expenditures which may reduce or eliminate the Respondent's payment of severance pay.[12]

CONCLUSIONS OF LAW

1. Respondent Sawyer of Napa, Inc. is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By withdrawing recognition from the Union at a time when there were pending unremedied unfair labor practices, the Respondent has violated Section 8(a)(5) of the Act.

4. By telling employees that they may not be receiving severance pay because the Union filed charges against the Company, the Respondent has violated Section 8(a)(1) of the Act.

5. The above-unfair labor practices is an unfair labor practice affecting commerce within the meaning of Section 2(6) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, I recommend that it be required to cease and desist therefrom. Further, I shall recommend that the Respondent be required to pay severance pay to its tannery employees who were terminated or laid off as a result of the closure of the tannery in accordance with the formula set forth in the Board's decision in *Transmarine Corp*., 170 NLRB 389 (1968), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As the parties have bargained to impasse over the effects of the tannery closure, it appears that no further bargaining is warranted; nor is there a need for bargaining language in the notice. Because the *Transmarine* remedy provides for a minimum of 2 week's backpay, I recommend that the Respondent be required to pay additional backpay to those laid off or terminated tannery employees who received less than 2 week's backpay.

As the Respondent's business is no longer in operation there is no recommendation for a notice posting.

It is further recommended that the Respondent mail to each of its former tannery employees[13] an appropriate notice attached as ''Appendix.''

[Recommended Order omitted from publication.]

[12] *Centre Engineering, Inc*., 253 NLRB 419, 420–421 (1980); *Adco Electric*, 307 NLRB 1113, 1118–1119 (1992).

[13] As the remedy here affects only the tannery employees, and all employees have either previously received copies of the settlement agreement notice or have worked during the notice posting period, it appears that copies of the notice here need only be mailed to the tannery employees.